

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/726,247

Applicant(s)

AMUNDSON ET AL.

Examiner

Le Nguyen

Art Unit

2174

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 23 October 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Steven P Sax/
Primary Examiner, Art Unit 2174

Continuation of 11. does NOT place the application in condition for allowance because: Applicant's arguments filed 10/23/07 have been fully considered but they are not persuasive.

Applicant argued:

(a) Alles does not describe or suggest two distinct set points that are used to control operation of a particular portion (e.g. the heater) of an HVAC system.

(b) Although Alles permits the user to make a particular setting for a particular time period and perhaps a different setting for a different time period, this is not the same as permitting the user to enter a time indicator, over-riding the fan for a time period in accordance with the time indicator and then returning to normal fan operation given that normal fan operation refers to the fan setting of the regular schedule of the thermostat. Furthermore, heating and/or cooling refers to a method of controlling an HVAC system that has a fan that normally operates during heating operations, during cooling operations, or during heating and cooling operations.

(c) The assertion that relative humidity refers to outdoor humidity has no credible basis for making such an assertion.

(d) There is no mention of sensing a duty cycle, much less altering a control set point in accordance with the duty cycle.

(e) Since the time periods of sleeping, active, empty, and relaxing refer to particular time periods within the regular schedule, the prior art of record fails to disclose the regular schedule is overridden by the selected schedule override choice via a UI and then the regular schedule is resumed.

(f) The references do not teach or suggest the controller of claims 11 and 21-24. In addition, Applicant challenge the taking of Official Notice that user inputs such as "Come Home Early", "Come Home Late", "Get Up Early", "Stay Up Late", "Stay Home" are well known in the art.

The Office disagrees for the following reasons:

Per (a) and in response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., two distinct set points that are used to control operation of a particular portion such as the heater) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

Per (b), Alles permits the user to make a particular temperature setting for particular time periods including sleeping, active and relaxing as well as energy savings period such as empty wherein such energy saving period in a AC portion of a HVAC system requires over-riding the fan for a time period in accordance with the time indicator and then returning to normal fan operation (figs. 20-21; col. 27, lines 17-27; col. 27, line 50 through col. 28, line 8; col. 31, lines 40-45; col. 32, lines 11-12). Moreover, the temperature settings that the user settle on for the time periods controls over-riding and "normal" fan operations. In regards to "heating and/or cooling", which literally translates to heating and/(and or) cooling, the use of "/" conveys that what comes before and what comes after may be construed as either inclusive or alternatives. Therefore, for the purpose of clarifying the claim(s), if by "heating and/or cooling", applicant meant to refer to a method of controlling an HVAC system that has a fan that normally operates during heating operations, during cooling operations, or during heating and cooling operations, applicant is invited to amend the claim language to reflect such meaning.

Per (c), the thermostat is coupled to sensors that are adapted to sense outdoor air quality (col. 28, lines 62-64), which includes sensing humidity (col. 29, lines 6-9).

Per (d), Ehlers teaches sensing a duty cycle and adjusting a control set point if the duty cycle exceeds a predetermined value (col. 35, lines 8-18).

Per (e), users dictate their "regular" schedule by selecting schedule overrides and selecting temperature settings for time periods such as sleeping, active, empty, and relaxing (Alles: figs. 20-21; col. 27, lines 17-27; col. 31, lines 40-45; Liebl: figs. 2 and 9(A-C); col. 14, lines 33-67; Ehlers: fig. 4H).

Per (f), Alles, Liebl and Ehlers teach a controller comprising a programmable regular schedule and a UI that accepts selection schedule override choice(s) from the user wherein the controller enters a mode for overriding the regular schedule based on the user responses via the UI at a first time and automatically returns to the regular schedule when the selected override choice expires, including temporarily overriding the regular schedule in an override mode based on the selected override choice(s) at a second time later than the first time (Alles: figs. 20-21; col. 27, lines 17-27; col. 31, lines 40-45; Liebl: figs. 2 and 9(A-C); col. 14, lines 33-67; Ehlers: fig. 4H). Alles further teaches displaying a natural language schedule override choice that users input (figs. 21-23; col. 32, lines 28-47). Furthermore, since applicant did not traverse the 2/27/07 assertion of official notice in applicant's 5/24/07 remarks, the official notice is taken to be admitted prior art as of the 8/23/07 Office action (MPEP 2144.03).